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In The

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,

Petitioner,

v.

JOHN E. MALESKO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. CORPORATIONS OPERATING FEDERAL PRISONS FOR PROFIT ARE SUBJECT TO *BIVENS* LIABILITY WHEN THEY VIOLATE THE EIGHTH AMENDMENT 6

A. *Bivens* Encompasses Private Prison Corporations That Violate the Eighth Amendment 6

B. *Bivens* Actions Are Particularly Appropriate Against For-Profit Prison Corporations 10

1. For-Profit Corporations Wielding Governmental Power over Prisoners Are Especially Prone to Abuse That Power 10

2. *Bivens* Liability Is Necessary to Deter For-Profit Prison Corporations from Committing Constitutional Violations 16

II. FOR-PROFIT PRISON CORPORATIONS DO NOT COME WITHIN THE *MEYER* EXCEPTION TO *BIVENS* 20

A. The Rationale for the *Meyer* Exception Does Not Apply to Private Prison Corporations 20

TABLE OF CONTENTS – Continued

Page

B. The Other Exceptions to *Bivens* Are Irrelevant Here 25

III. CASES UNDER SECTION 1983 SUPPORT ALLOWING *BIVENS* SUITS AGAINST CORPORATIONS 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970) 27

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985). 17

Bell v. Wolfish, 441 U.S. 520 (1979) 11

Billman v. Indiana Department of Corrections, 56 F.3d 785 (7th Cir. 1995). 8

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Booth v. Churner, 121 S. Ct. 1819 (2001). 9

Bowsher v. Synar, 478 U.S. 714 (1986). 14

Bush v. Lucas, 462 U.S. 367 (1983) 25

Butz v. Economou, 438 U.S. 478 (1978) 29

Carlson v. Green, 446 U.S. 14 (1980). ..... *passim*

Chappell v. Wallace, 462 U.S. 296 (1983) 26

Cleavinger v. Saxner, 474 U.S. 193 (1985) 11

Davis v. Passman, 442 U.S. 228 (1979). 9, 10

Doe v. Washington County, 150 F.3d 920 (8th Cir. 1998). 17

Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) 13

Farmer v. Brennan, 511 U.S. 825 (1994). 1, 10

F.D.I.C. v. Meyer, 510 U.S. 471 (1994). ..... *passim*

Houchins v. KQED, Inc., 438 U.S. 1 (1978) 11

TABLE OF AUTHORITIES – Continued

Page

Janes v. Hernandez, 215 F.3d 541 (5th Cir. 2000) 17

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 11

Logue v. United States, 412 U.S. 521 (1973) 20

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 27

Malesko v. Correctional Services Corporation, 229 F.3d 374 (2d Cir. 2000) 8, 25

McCarthy v. Madigan, 503 U.S. 140 (1992) 8, 10, 26

Monell v. Department of Social Services, 436 U.S. 658 (1978) ..... *passim*

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 13

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 12

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 11

Pell v. Procunier, 417 U.S. 817 (1974) 12

Richardson v. McKnight, 521 U.S. 399 (1997) ..... *passim*

Schweiker v. Chilicky, 487 U.S. 412 (1988) 26

Turner v. Safley, 482 U.S. 78 (1987) 11

United States v. Orleans, 425 U.S. 807 (1976) 20

United States v. Stanley, 483 U.S. 669 (1987) 25, 26

Wilson v. Layne, 526 U.S. 603 (1999) 28

West v. Atkins, 487 U.S. 42 (1988) 11

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

5 U.S.C. § 552 12

5 U.S.C. § 552a 12

5 U.S.C. § 552b 12

5 U.S.C. app. 3 § 9 13

28 U.S.C. § 1331 9

28 U.S.C. § 1346b 9

28 U.S.C. § 1915 10

28 U.S.C. § 2671 7

29 U.S.C. § 794 8

31 U.S.C. § 9105 13

31 U.S.C. § 9106 13

42 U.S.C. § 1983 ..... 5, 26, 27, 28, 29

42 U.S.C. § 1997e(a) 9

42 U.S.C. § 1997e(e) 9

42 U.S.C. §§ 12131-12133 8

BOOKS AND SCHOLARLY ARTICLES

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82 (1998) 22

Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REF. 249 (1995) 12

TABLE OF AUTHORITIES – Continued

Page

THE FEDERALIST No. 84 (Alexander Hamilton)..... 14

Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J.FIN.ECON. 305 (1976)..... 22

FRANCIS J. LEAZES, ACCOUNTABILITY AND THE BUSINESS STATE: THE STRUCTURE OF FEDERAL CORPORATIONS (1987)..... 13

Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987)..... 22

NEWSPAPER ARTICLES

Mark Brunswick, *Trial Set to Begin in Juvenile Abuse Case*, STAR-TRIBUNE (Minneapolis-St. Paul, MN), Apr. 3, 2000 at 01B..... 16

Guy Coates, *Tallulah Prison Returning to State Control, Walkout of Eighteen Guards Influenced Decision*, NEW ORLEANS TIMES-PICAYUNE, Sept. 22, 1999 at A2..... 16

David Jackson, *Broken Teens Left in the Wake of Private Gain: Tribune Investigative Report: How Troubled Youth Become Big Business* (Part 2 of 3), CHI. TRIB., Sept. 27, 1999 at 1..... 14

Carrie Johnson, *Guard Suspended After Escape*, ST. PETERSBURG TIMES, May 8, 2001 at 1..... 15

Teresa Mears, *Detainees Held by INS Say Jails Rife With Abuse*, BOSTON GLOBE, Aug. 2, 1998 at A22.... 15

TABLE OF AUTHORITIES – Continued

Page

Kit Miniclier, *Olney Springs Prison Agrees to Improvements*, DENVER POST, Apr. 27, 1999 at B01.... 16

Glenn Puit, *Inmate Warned of Trouble, Prison Staffer Says*, LAS VEGAS REVIEW-JOURNAL, June 13, 2001 at 10B..... 15

Todd Richissin, *'Fight Club' Probed at Maryland Jail for Juveniles*, BALT. SUN, July 3, 2001 at 1A..... 15

Anthony Spangler, *Boot Camp Discourages Inmates' Illness Reports*, FT. WORTH STAR-TELEGRAM, Jan. 25, 2001 at 1..... 15

Bob Schober, *Twelve Probationers Pulled From Camp: Tarrant Judge Acts on Allegation*, DALLAS MORNING NEWS, May 19, 2001 at 38A..... 15

Kate Shatzkin, *Cullen Audit Raises Concern, Maryland Probe Identifies Mismanagement at Juvenile Facility*, BALT. SUN, Nov. 18, 2000 at 1B..... 15

MISCELLANEOUS

BUREAU OF PRISONS, STATEMENT OF WORK: COMMUNITY CORRECTIONS CENTERS (Dec. 2000)..... 19

Correctional Services Corporation Annual Report, SEC Form 10-K (Apr. 2, 2001).....2, 19

HOUSE COMM. ON GOV'T OPERATIONS, BUREAU OF PRISONS HALFWAY HOUSES: CONTRACTING OUT RESPONSIBILITY, H.R. REP. No. 102-139 (1991)..... 15

INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners.

Among the more recent cases in which the National Prison Project has represented prisoner petitioners or respondents in this Court are *Young v. Harper*, 520 U.S. 143 (1997); *Lewis v. Casey*, 518 U.S. 343 (1996); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); and *Wilson v. Seiter*, 501 U.S. 294 (1991).[1]

STATEMENT OF THE CASE

In 1994, the Respondent John E. Malesko was a prisoner serving an eighteen-month federal sentence for securities fraud who had been transferred by the Bureau of Prisons to the Le Marquis Community Corrections Center in New York City, a halfway house operated by the Petitioner, Correctional Services Corporation ("CSC"). CSC is a publicly-traded for-profit prison corporation.[2]

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amicus curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

[2] CSC's revenues for the year ended December 31, 2000 were over $200 million. The company operates prisons, jails,

According to Mr. Malesko's complaint, he had been previously diagnosed with congestive heart failure. After CSC instituted a policy requiring all prisoners living below the sixth floor to use the stairs rather than the elevator, a CSC staff member ordered Mr. Malesko to climb the stairs to his living quarters on the fifth floor. In attempting to climb the stairs, he suffered a heart attack and fell, suffering head injuries. At the time, Mr. Malesko had not received his prescribed medication and was under medical orders not to engage in strenuous activities such as stair-climbing. As a result of his head injuries, he requires medical care and is unable to work.

Mr. Malesko filed suit against CSC. The United States District Court for the Southern District of New York dismissed the claim against CSC on the ground that corporations are not subject to suit for constitutional wrongs under the rule of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Second

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halfway houses, juvenile "boot camps," and other secure facilities. CSC consists of three divisions: Adult Corrections, Community Corrections, and Youthful Offender/Juvenile Programs, the latter operating largely under the name Youth Services International, a juvenile prison company acquired by CSC. The combined corporation owns more than 32 facilities housing approximately 4,300 juveniles and 13 facilities housing approximately 4,700 adults. *See* CSC Annual Report, SEC Form 10-K (Apr. 2, 2001) 3-11, *available at* http://www.correctionalservices.com/Investors/investors.html (in SEC Edgar Database). The company was previously known as Esmor, Inc., but changed its name after reports of inmate rioting and abuses. *See infra* note 6.

Circuit Court of Appeals reversed, and this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

A central premise of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is that those who act in the name of the federal government possess "a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392-93. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court extended *Bivens* to Eighth Amendment violations against federal prisoners. The *Carlson* Court rejected the argument that prison officials would be unduly inhibited in the performance of their duties if *Bivens* claims were allowed, *see id.* at 19, and determined that a *Bivens* remedy would be more effective than other available remedies in deterring constitutional violations. This is particularly true in the case of private prisons, where the existence of a *Bivens* remedy helps to reduce the financial incentive to sacrifice constitutional rights in order to reduce costs and increase corporate profits. Moreoever, none of the alternative remedies proposed by CSC or the United States is nearly as effective as *Bivens*.

Because of security concerns, prisons and jails are given authority over those they confine to a degree not otherwise tolerated under the Constitution. Moreover, prisons are closed institutions substantially shielded from public view and oversight. The unchecked power of those who run prisons, like all unrestrained power, results in abuses. Such abuses are particularly likely to occur in

private for-profit prison corporations, which are primarily focused on the bottom line, and which are even less subject to public scrutiny than publicly run prisons. These dangers have repeatedly materialized in the actual operation of private prisons, including those operated by the Petitioner, Correctional Services Corporation. Accordingly, for-profit prisons are even more likely than publicly-operated prisons to formulate policies that will result in constitutional violations.

For-profit prisons are also more likely than governmental agencies to respond to the incentives provided by potential liability for damages. Contrary to the argument of Petitioner and the government that allowing a *Bivens* action against for-profit prisons will inappropriately discourage privatization, recognizing the availability of a *Bivens* action will allow market dynamics, including the availability of corporate liability insurance, to strike the appropriate balance between the need for assertive actions by the corporation's employees and the need to prevent violations of the Constitution in the name of the government.

Petitioner and the government argue that for-profit prison corporations should be treated, for these purposes, like the federal agency in *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), and thus are not subject to a *Bivens* claim. In *Meyer*, however, allowing suit directly against the FDIC would have been, for all practical purposes, indistinguishable from allowing suit directly against the federal government. That is plainly not true for a private prison. Likewise, none of the Court's other rationales for the decision in *Meyer* apply in this context.

In fact, for the present purposes, the Petitioner bears far more functional resemblance to the federal agents in *Bivens* than the federal agency in *Meyer*. A central insight of *Bivens* is that the potential divergence between the goals and objectives of the government and of its agents is a source of the abuse of rights. For-profit prisons acting on behalf of the government also have goals and objectives independent of the government's, and this divergence also supports recognition of a *Bivens* damages remedy. Moreover, particularly because for-profit prison corporations must already take into account financial liabilities resulting from their employees' violations of constitutional rights, allowing a *Bivens* remedy against for-profit prisons will not create a direct financial burden on the federal government any more than recognition of a *Bivens* action against federal employees who violate the Eighth Amendment does.

Aside from *Meyer*, neither of the other circumstances that have justified an exception to the *Bivens* rule are present here, because this case involves neither a comprehensive remedial scheme designed by Congress nor the unique structure of the military.

As Petitioner and the government concede, a corporation is subject to suit pursuant to 42 U.S.C. § 1983. There is no justification for applying a different rule to *Bivens* actions. Indeed, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court allowed Section 1983 suits against corporations after noting that corporations are treated as natural persons "for virtually all purposes of constitutional and statutory analysis." *Id.* at 687. A warden of a federal prison is no less accountable for constitutional violations than the warden of a state

prison; a corporation that confines federal prisoners should be no less accountable for constitutional violations than a corporation holding state prisoners.

ARGUMENT

I. CORPORATIONS OPERATING FEDERAL PRISONS FOR PROFIT ARE SUBJECT TO *BIVENS* LIABILITY WHEN THEY VIOLATE THE EIGHTH AMENDMENT

A. *Bivens* Encompasses Private Prison Corporations That Violate the Eighth Amendment

A right without a remedy is no right at all. Accordingly, in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971), this Court recognized a cause of action that remains central to assuring that constitutional boundaries are observed by those purporting to act in the name of the federal government. The critical insight of *Bivens* is that those who act in the name of the federal government have a special capacity not possessed by private actors to misuse power:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Id. at 391-92. Had the opposing view prevailed in *Bivens*, the power of the Fourth Amendment to protect against abuses by federal agents would have been gravely undermined, because such abuses could have resulted in damages only to the extent that the constitutional violation was also a violation of state law. *See Bivens*, 403 U.S. at 393-94.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Court extended *Bivens* to encompass violations of the Eighth Amendment produced when those acting under federal authority deny constitutionally required medical care to prisoners. In doing so, the Court rejected the view that "special factors" free prison officials from *Bivens* liability, because prison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim. *Carlson*, 446 U.S. at 19. The Court found that a *Bivens* remedy was available, even though the plaintiff there had an alternative remedy under the Federal Tort Claims Act, because the "FTCA is not a sufficient protector of the citizens' constitutional rights," *Carlson*, 446 U.S. at 23, and the *Bivens* remedy is "more effective." *Id.* at 20.[3] The Court emphasized that

[3] Here, no equally effective alternative remedy is available. The FTCA specifically exempts corporations such as CSC from its reach. *See* 28 U.S.C. § 2671 (1994) (excluding "any contractor with the United States" from the reach of the FTCA). If anything, the argument in favor of a *Bivens* claim is stronger on these facts than in *Carlson* itself. Petitioner, however, suggests four categories of "substantial remedial options" ostensibly available to Mr. Malesko. *See* Brief of Petitioner (Pet. Br.) at 13-18.

"the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose," *id.* at 21, and that "[i]t is

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First, Petitioner suggests that prisoners in Mr. Malesko's shoes could bring *Bivens* actions against the officers themselves. But Mr. Malesko himself was unable to identify the individual officers responsible for enforcing the CSC corporate policy that resulted in his injuries until after his claim was time-barred. *See Malesko v. Correctional Services Corporation*, 229 F.3d 374, 376-77 (2d Cir. 2000). His situation is far from unique. *See, e.g., Billman v. Indiana Department of Corrections*, 56 F.3d 785, 789 (7th Cir. 1995) (Posner, J.) ("Billman is a prison inmate. His opportunities for conducting a precomplaint inquiry are, we assume, virtually nil. The state's attorney smiled when we asked him at argument whether Billman would be given the run of the prison to investigate the culpability of prison employees for the rape.").

Second, Petitioner proposes the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133 (1994), and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1998), as potential substitutes for a *Bivens* remedy. *See* Pet. Br. at 14-15. However, the appropriate "inquiry is whether Congress has created what it views as an *equally* effective scheme. Otherwise the two can exist side by side." *Carlson*, 446 U.S. at 23 n.10. It is not at all clear that either statute would provide any remedy for Mr. Malesko, and obviously, neither statute would provide any remedy for complaints of excessive force, for a failure to protect from harm, or for violations of other Eighth Amendment rights that could be infringed by a for-profit prison.

Third, Petitioner argues that Mr. Malesko could file a state tort action. This alternative, however, was rejected by the Court in both *Bivens*, 403 U.S. at 394, and *Carlson*, 446 U.S. at 23 (emphasizing the federal interest in uniformity of remedies).

Fourth, Petitioner argues that additional "administrative or injunctive vehicles" are available. *See* Pet. Br. at 16-18. This Court, however, has rejected the argument that prison grievance systems, which are not created by Congress, displace *Bivens* relief. *See McCarthy v. Madigan*, 503 U.S. 140, 149-50 (1992). Finally, Petitioner cannot justify the claim that injunctive relief

almost axiomatic that the threat of damages has a deterrent effect." *Id.* As discussed below, the deterrent purpose is especially well-served when the defendants are for-profit corporations, who, like CSC, are under pressure to cut costs and maximize profits at the expense of constitutional rights, and where mechanisms for public oversight are greatly diminished. Such defendants are more likely to adjust their behavior in response to the incentives provided by the prospect of *Bivens* liability.

There is also no doubt that *Bivens* actions here are "judicially manageable," *Davis v. Passman*, 442 U.S. 228, 245 (1979), given the federal courts' long experience assessing Eighth Amendment claims involving damages. Likewise, because of the many administrative and judicial constraints on prisoner litigation,[4] applying *Bivens*

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pursuant to 28 U.S.C. § 1331 (1994) or Bureau of Prisons oversight could provide an effective alternative remedy. Since the harm done to Mr. Malesko is completed, for him, as for Mr. Bivens, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

[4] In 1996, Congress passed the Prison Litigation Reform Act ("PLRA"), which places many restrictions on prisoner litigation, including a number of provisions that significantly discourage the filing of damages actions. For example, 42 U.S.C. § 1997e(a) (Supp. 2000) requires prisoners seeking only money damages to exhaust administrative remedies, regardless of whether the grievance system at issue allows for the award of monetary relief. *See Booth v. Churner*, 121 S. Ct. 1819 (2001). 42 U.S.C. § 1997e(e) (Supp. 2000) bars damages actions that seek an award for mental or physical injury suffered by a prisoner absent a prior showing of physical injury. The same limitation applies to claims filed under the Federal Torts Claims Act. *See* 28 U.S.C. 1346b(2) (Supp. 2000). The "three strikes" provision of PLRA prevents a prisoner who has had three actions dismissed as

here will not inordinately tax the dockets of the federal courts. *See Davis*, 442 U.S. at 248.

Since *Carlson*, this Court has never questioned the proposition that *Bivens* liability provides a remedy for violations of the Eighth Amendment committed by agents of the government. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140, 150-52 (1992). The rule of *Bivens* is no less appropriate when the Eighth Amendment is violated by private corporations that, under contracts with the federal government, operate prisons for a fee.

B. *Bivens* Actions Are Particularly Appropriate Against For-Profit Prison Corporations

1. For-Profit Corporations Wielding Governmental Power over Prisoners Are Especially Prone to Abuse That Power.

"[P]risons and jails are inherently coercive institutions that for security reasons must exercise nearly total

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frivolous or malicious, or because the action fails to state a claim, from proceeding in a civil action unless the prisoner is in imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g) (Supp. 2000). 28 U.S.C. § 1915(b)(1) (Supp. 2000) requires at least partial payment of the filing fee by a prisoner in all conditions of confinement cases in which the prisoner has any money in his or her prison account, or receives such funds in the future. 28 U.S.C. § 1915(e)(2) (Supp. 2000) sets up a special requirement that the district court review *sua sponte* any prison conditions case filed by a current prisoner, in order to determine if the claim on its face is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks damages from a defendant who is immune from liability.

control over their residents' lives and the activities within their confines . . . ." *West v. Atkins*, 487 U.S. 42, 57 n.15 (1988). Moreover, this Court has repeatedly emphasized that prison officials must be accorded great discretion, allowing restrictions on the constitutional rights of prisoners that would never be tolerated in free society. *See Turner v. Safley*, 482 U.S. 78, 95 (1987); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). When government decides to vest its power over prisoners in a for-profit corporation, that decision constitutes a formidable grant of authority. If a private company contracted with the government to deliver the mail, the potential for violation of constitutional rights would be more restricted. But there are few spheres, if any, in which comparable governmental power to control private citizens, and potentially to use force – including deadly force – is ceded to private entities.

Prisons are also in large part shielded from public scrutiny. *See Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985) (noting that prisons, unlike public schools, are exempt from the safeguards against abuses provided by the opportunity for community observation); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting) ("Prisons are too often shielded from public view; there is no need to make them virtually invisible."). In particular, the media have very limited ability to monitor events and conditions in prisons. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) ("The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter

these institutions."); *Pell v. Procunier*, 417 U.S. 817, 828 (1974). Private prison companies, by virtue of their corporate status and independence from the government, are even more impervious to public scrutiny. Unlike the Bureau of Prisons itself, private contractors who operate federal prisons may refuse to allow public investigation of their records, policies and finances.[5]

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[5] The Bureau of Prisons and other federal government entities are subject to intense scrutiny by coordinate branches of government, the media, and the general public. Because private prison corporations are not federal agencies, such monitoring is often not required, and prison contractors are able to avoid scrutiny. *See generally* Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. Mich. J.L. Ref. 249, 264-272 (1995) (explaining that statutory accountability measures do not cover private prison corporations).

Congress enacted the Freedom of Information Act (FOIA), the Administrative Procedures Act (APA) and the Government in the Sunshine Act, *see* 5 U.S.C. §§ 552, 552a-b (1994), in an effort to ensure that agencies and federal corporations are accountable to the public. These statutes require agencies to answer requests for information, to publish their rules and regulations, and to allow for public scrutiny of internal decisions and records. The basic purpose of such laws is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (discussing legislative purpose of FOIA). While the Bureau of Prisons must be in strict compliance with such laws, private prisons are exempt. *See* Casarez, *Furthering the Accountability Principle, supra*. The Bureau of Prisons is also subject to review concerning both financial and budgetary decisions. The Office of the Inspector General has the power to review the "assets, liabilities, contracts, property, records . . . authorizations,

While policy-making officials of the federal government are subject to channels of political accountability that operate independently of market forces, there are few comparable curbs on the power of the corporate entity. *See Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982), (discussing "formal and informal checks and balances," including scrutiny by the press and oversight by Congress, that prevent misconduct by the Executive). Business corporations are accountable chiefly to their stockholders and financial interests, rather than to the public interest. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("There should be no confusion [about] the duties which Mr. Ford conceives that he . . . owe[s] to the general public and the duties which in law he [owes

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allocations, and other funds" used in the Bureau of Prisons. 5 U.S.C. app. 3 § 9 (1994 & Supp. 2001).

Government-controlled corporations are subject to a range of oversight mechanisms that are inapplicable to private prison corporations. Wholly-owned federal corporations are subject to reviews similar to those required of agencies, and are usually subject to public disclosure statutes. *See* FRANCIS J. LEAZES, ACCOUNTABILITY AND THE BUSINESS STATE: THE STRUCTURE OF FEDERAL CORPORATIONS 103 (1987) (explaining the different forms of oversight for entities performing government functions). Mixed ownership government corporations are also regulated. They are audited by the General Accounting Office, and during these audits may be required to submit all "books, accounts, financial records, reports, files, workpapers, and property" of the corporation. 31 U.S.C. § 9105 (1994). In addition, annual management reports must be submitted to Congress. 31 U.S.C.A. § 9106 (1994).

Absent such accountability, the availability of *Bivens* relief, with the accompanying judicial and public scrutiny, is even more critical.

to the stockholders]. A business corporation is organized and carried on primarily for the profit of the stockholders."). When business corporations operate prisons, the pressure to cut costs and maximize profits will be at odds with the imperative to provide constitutionally adequate conditions of confinement so long as the costs of noncompliance with the Constitution remain low.

In the prison, perhaps more so than in any other context, unchecked power leads to the abuse of individual rights. "[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." THE FEDERALIST NO. 84, at 252 (Alexander Hamilton) (Encyclopedia Britannica ed., 1952) (*quoting* 1 William Blackstone, Commentaries *136); *cf. Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring). ("*Power and strict accountability of its use* are the essential constituents of good government.") (citation omitted). Given the extraordinary nature of the potential for misuse of power by those who operate private prisons, provision of a remedy for such misuse is particularly imperative.

Concerns that private prison corporations will misuse governmental power are not based solely on conjecture. Experience with the actual operation of private prisons – including the facilities operated by Correctional Services Corporation[6] – proves that the dangers inherent

[6] Examples of the abuses reported in facilities operated by CSC are abundant. *See, e.g.*, David Jackson, *Broken Teens Left in the Wake of Private Gain, Tribune Investigative Report: How Troubled Youth Become Big Business* (Part 2 of 3), CHI. TRIB., Sept.

in the exercise of unchecked power have repeatedly materialized. *See, e.g.* HOUSE COMM. ON GOV'T OPERATIONS,

27, 1999 at 1 (reporting that revenues of CSC have increased seven-fold while facilities have experienced a multitude of problems, which include overcrowding, holding children beyond their release dates to increase the company's per-diem payments, allowing guards to stage gladiator-style matches between teenage boys, giving severely deficient medical care, failing to provide required psychological counseling and treatment, and underpaying staff); Teresa Mears, *Detainees Held by INS Say Jails Rife With Abuse*, BOSTON GLOBE, Aug. 2, 1998 at A22 (reporting that after INS canceled contract with Esmor due to rioting and numerous serious problems company changed its name to Correctional Services Corporation); Todd Richissin, *'Fight Club' Probed at Maryland Jail for Juveniles*, BALT. SUN, July 3, 2001 at 1A (finding guards instigated staged fights between teens with alcohol and drug abuse problems at CSC facility); Kate Shatzkin, *Cullen Audit Raises Concern, Maryland Probe Identifies Mismanagement at Juvenile Facility*, BALT. SUN, Nov. 18, 2000 at 1B (describing findings of state audit of CSC facility which included a pattern of understaffing, medical personnel with expired licenses, a lack of mental health services, three-month long waits for drug treatment, and a failure to provide education and job training to youths); Glenn Puit, *Inmate Warned of Trouble, Prison Staffer Says*, LAS VEGAS REVIEW-JOURNAL, June 13, 2001 at 10B (reporting that before riot involving nineteen boys took place CSC staff member was warned, but no preventative action was taken to stop the uprising); Bob Schober, *Twelve Probationers Pulled From Camp: Tarrant Judge Acts on Allegation*, DALLAS MORNING NEWS, May 19, 2001 at 38A (three former inmates at CSC facility had been awarded relief after filing suit against an employee for sexual harassment; a dozen more inmates were pulled after a guard was accused of having sex with an inmate); Carrie Johnson, *Guard Suspended After Escape*, ST. PETERSBURG TIMES, May 8, 2001 at 1 (CSC guard gave key to inmate, allowing three offenders to escape); Anthony Spangler, *Boot Camp Discourages Inmates' Illness Reports*, FT. WORTH STAR-TELEGRAM, Jan. 25, 2001 at 1 (describing death of an eighteen-

BUREAU OF PRISONS HALFWAY HOUSES: CONTRACTING OUT RESPONSIBILITY, H.R. REP. NO. 102-139, at 16-51 (1991) (summarizing multiple problems endemic in the Bureau of Prison's halfway house contracting program); Brief of Legal Aid Society of the City of New York as *Amicus Curiae*. Both the history of for-profit prisons and the current experience with such prisons underlines the grave dangers of brutality, mistreatment and mismanagement attendant to the privatization of the penal function.

2. *Bivens* Liability Is Necessary to Deter For-Profit Prison Corporations from Committing Constitutional Violations.

In *Carlson*, the Court emphasized that "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose." 446 U.S. at 21. This aspect of *Bivens*'s

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year-old boy who developed pneumonia and was refused medical treatment despite obvious physical signs of his condition and requests for help; indicating this is a pattern at the CSC facility; describing previous death of a girl whose repeated headache complaints were ignored, and then who died of a brain aneurysm); Mark Brunswick, *Trial Set to Begin in Juvenile Abuse Case*, STAR-TRIBUNE (Minneapolis-St. Paul, MN), Apr. 3, 2000 at 1B (CSC counselor, who was paid $6.50 an hour, nightly sexually assaulted juveniles in the facility); Guy Coates, *Tallulah Prison Returning to State Control, Walkout of Eighteen Guards Influenced Decision*, NEW ORLEANS TIMES-PICAYUNE, Sept. 22, 1999 at A2 (guard walk-out, in which two hundred inmates were left alone was partly caused by low $6/hour wages paid to guards by CSC facility); Kit Miniclier, *Olney Springs Prison Agrees to Improvements*, DENVER POST, Apr. 27, 1999 at B01 (state recommended that CSC facility make 29 changes in procedure, training, equipment and design following inmate riot that required four state riot-control squads to be called in).

logic is especially compelling when the conduct sought to be deterred may be avoided by changes in corporate policy. Eighth Amendment violations often result from, or are exacerbated by, bad policymaking rather than the acts of renegade guards. *See, e.g., Janes v. Hernandez*, 215 F.3d 541, 542 (5th Cir. 2000) (per curiam) (holding county liable for injuries because policy of confining inmates of no known propensity for violence together with dangerous inmates created an unsafe jail); *Doe v. Washington County*, 150 F.3d 920, 922-23 (8th Cir. 1998) (upholding damage award against county for beating, rape and torture of juvenile by other juvenile detainees in county jail where there was a policy of tolerating severe overcrowding; "A government entity can be liable under section 1983 even though no government official was found personally liable."); *Anderson v. City of Atlanta*, 778 F.2d 678, 687 (11th Cir. 1985) ("[I]f the City of Atlanta had not utilized a custom, policy, pattern and/or practice of inadequately staffing the Pre-trial Detention Center, thus making it difficult for the officers to tend to the medical complaints of the detainees, Larry Anderson would not have died in Fulton County Jail."). Insofar as such policies benefit the financial bottom line, for-profit prison corporations are even more likely than government to formulate policies that will result in constitutional violations.

Private prison corporations are also more likely than government agencies to respond to the incentives provided by damage awards. As this Court recently concluded in *Richardson v. McKnight*, 521 U.S. 399, 412 (1997):

> The organizational structure [of private prison companies] is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide – pressures not necessarily present in government departments.

While *Richardson* concerned the liability of prison guards in private prisons confining state prisoners, the market dynamics are not materially different here.

The government, nonetheless, argues that *Bivens* liability for for-profit prison corporations will distort the operation of market forces, forcing privately operated prisons to absorb the costs of litigation from which the Bureau of Prisons would be shielded, and that this extra cost will make private prisons an artificially expensive option in comparison to Bureau-run facilities. This consequence, the government argues, will distort the choice to confine prisoners in a public or private facility, threatening the government's "privatization policy." *See* Brief of the United States as *Amicus Curiae* (U.S. Br.) at 27-28; Pet. Br. 30-31.

The government's argument should be given no weight in a system that historically and appropriately places a greater value on constitutional rights than on corporate profits. Indeed, requiring prison corporations to bear the costs of violating the constitutional rights of those they confine will allow market forces to operate appropriately. This Court recognized as much in *Richardson* when it declined to extend a qualified immunity defense to private prison guards in part because it concluded that market forces, including the availability of

insurance against the costs of possible civil rights violations,[7] would fairly balance the risk of staff timidity against the risk of civil rights violations. *Richardson*, 521 U.S. at 409-11. In explaining the balance it had struck, the Court noted: "Competitive pressures mean . . . that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement." *Id.* at 409. This is a positive result, not a negative result, as the government seems to assume.

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[7] Like the State of Tennessee in *Richardson*, the federal Bureau of Prisons requires all prison contractors to carry comprehensive liability insurance. *See* BUREAU OF PRISONS, STATEMENT OF WORK: COMMUNITY CORRECTIONS CENTERS (Dec. 2000) 8, *available at* http://www.bop.gov. CSC's Annual Report states that "[e]ach management contract with a governmental agency requires CSC to maintain certain levels of insurance coverage for general liability . . . and to indemnify the contracting agency for claims and costs arising out of CSC's operations." CSC Annual Report, SEC Form 10-K (Apr. 2, 2001) 12 (describing CSC's large general liability insurance and umbrella insurance policies, covering CSC and each of its subsidiaries). "Comprehensive insurance coverage increases the likelihood of employee indemnification . . . . " *Richardson*, 521 U.S. at 400. Moreoever, it is CSC's "general practice to indemnify individual employees who are sued in connection with matters arising within the scope and course of their employment, and which are not criminal in nature." *See* Letter from George B. Stasluk to Steven Pasternak 1 (January 11, 1999) (in Joint Appendix at 153-155, *Malesko v. Correctional Services Corporation*, No. 99-7995 (2d Cir. 2000)).

II. FOR-PROFIT PRISON CORPORATIONS DO NOT COME WITHIN THE *MEYER* EXCEPTION TO *BIVENS*

A. The Rationale for the *Meyer* Exception Does Not Apply to Private Prison Corporations

Petitioner's argument hinges on this Court's acceptance of the proposition that a for-profit prison that contracts with the federal government to take custody of prisoners should be treated for *Bivens* purposes as the equivalent of a federal agency.[8] Petitioner and the government both attempt to derive a rule from *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), that *Bivens* applies only to "individual federal officers," not to entities. *See* Pet. Br. at 7-13; U.S. Br. at 18-20.

Meyer does not support this argument. Its holding that federal agencies may be sued under *Bivens* rests on a series of assumptions and considerations that do not

[8] Correctional Services Corporation is not a "federal agency" for any purpose relevant to this case. *See Logue v. United States*, 412 U.S. 521, 528 (1973) (holding that a county that contracted with the government to incarcerate federal prisoners was not a "federal agency" under the FTCA, which defines "federal agency" to exclude "government contractors;" even though the contract required the county to comply with Bureau of Prisons rules and regulations and to submit to government monitoring, the critical element in distinguishing an agency from a contractor is the government's power "to control the detailed physical performance of the contractor."); *cf. United States v. Orleans*, 425 U.S. 807, 808 (1976) ("The question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its daily operations are supervised by the Federal Government.").

apply to a private prison contractor. *Meyer*, 510 U.S. at 484. First, the Court noted that its decision in *Bivens* to recognize a damage remedy against individual federal agents who violate the Constitution "contemplated that official immunity would be raised" to preclude a suit directly against the federal government. *Id.* at 485. Because Congress had waived the defense of sovereign immunity for constitutional torts applicable to the FDIC, *see id.* at 483, allowing a direct suit against the government would have worked an enormous expansion of *Bivens*. Indeed, allowing suit against the FDIC would have been, for all practical purposes, indistinguishable from allowing suit directly against the federal government. In contrast, a suit against a governmental contractor is simply not comparable, on either financial or policy grounds, to suit against the federal government itself.

Second, the Court assumed that the opportunity to bring constitutional tort actions against individual agents was sufficient to deter constitutional violations and that suit against the agency was unnecessary. *See id.* at 485. In this case, however, CSC is in an analogous position to the federal agent in *Meyer*, not the federal agency. One of the central insights of *Bivens* is that federal agents bring motivations and objectives to their work that are distinct from the goals of their employers, and that this divergence can give rise to the misuse of governmental power. *See Bivens*, 403 U.S. at 392. Federal contractors also bring their own objectives to the table, which create a similar risk of abuse. Specifically, a corporation contracting with the government will respond to "ordinary market pressures" that will shape the corporation's decisions,

including decisions with respect to actions that risk violating constitutional rights. *See Richardson*, 521 U.S. at 409-11.[9]

In this case, for example, the rule barring Mr. Malesko from using the elevator was not imposed by an ill-willed guard, but by corporate policy, most likely stemming from the additional costs entailed in providing sufficient staffing to allow prisoners with medical needs to use the elevator. Because the contract employees and the contractor pose separate risks that their independent objectives will give rise to a constitutional violation, *Meyer* is not analogous and the rationale for *Bivens* includes suit against the corporation itself.

Meyer's third rationale is that, if federal agencies could be sued directly for damages, plaintiffs would

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[9] In the language of neoclassical economics, the costs of aligning employees' or agents' incentives with those of their employer or principal are referred to as "agency costs" or "monitoring costs." *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J.FIN.ECON. 305, 305-10 (1976); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L.REV. 4 (1987).

The "agency costs," when prison contractors make decisions for the sake of profit at the expense of their duty to provide constitutional conditions of confinement, are especially great. Indeed, the framers of the Eighth Amendment were "centrally concerned with the agency problem – the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents' sentiments and liberty." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82 (1998) (discussing origins of the Eighth Amendment cruel and unusual punishment clause in abuses by authorities in England).

always sue the agency in preference to individual employees in order to avoid a defense of qualified immunity. *See Meyer*, 510 U.S. at 485. This rationale is far less pertinent in the case of private contractors because there will frequently be reasons to include the contractor's responsible employees as defendants. It may be that only employees will be potentially liable, or there may be other reasons to name as a defendant the employee who actually caused the injury. In no case will there be an incentive to name only the corporation in order to avoid a defense of qualified immunity, because, under *Richardson*, corporate employees, unlike federal employees, are not entitled to raise a qualified immunity defense. *See Richardson*, 521 U.S. at 412.

The final rationale in *Meyer* is that "a damages remedy against federal agencies would be inappropriate even if such a remedy were consistent with *Bivens*" because it would create "a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486. Again, this rationale is no more applicable to federal contractors than it was to the federal agents in *Bivens*. Any financial consequences to the federal government from a suit against one of its contractors resemble the consequences of a lawsuit against a government employee based on an official action. In either case, those consequences would discourage potential employees from seeking such positions and would therefore require the government either to provide reimbursement for any potential damages, or to pay more to attract equally qualified candidates. Notwithstanding this potential indirect financial impact, the Court in *Bivens* allowed such

litigation to go forward because of the importance of ensuring fidelity to the commands of the Constitution.

Similarly, the possibility of damages against a private corporation could affect the price at which the corporation would be willing to contract with the government. But the effect would be even more diffuse than the effect of damages liability on recruiting government employees because, in most circumstances, the corporate employees would also be potentially liable for damages. Corporations operating federal prisons, such as CSC, may and often do indemnify their employees for the costs of litigation, and are required by the Bureau of Prisons to maintain comprehensive insurance coverage. *See supra* note 7; *cf. Richardson*, 521 U.S. at 409-11 (assuming that the costs of contractor staff liability for constitutional wrongs will be passed onto the contractor directly). Moreover, although a private corporation may respond directly to these economic pressures, such pressures to comply with the Constitution are not in tension with governmental goals. As noted above, recognizing a damages remedy against private prison companies that violate the Constitution will provide such companies with appropriate incentives to take necessary security measures. *See supra* at 18-19.[10] Finally on this point, the government's

[10] Moreover, the potential impact on government policy is no different if government contractors, as well as government employees and contract employees, are potentially subject to liability for constitutional torts. If anything, there is less possibility that liability will produce excessive timidity in governmental decision-making when the potential liability involves contractors rather than direct governmental employees. *See Richardson*, 521 at 409-11.

purpose in delegating its traditional penal function cannot legitimately be to allow a corporation to violate the Constitution in the name of the government, whether such violation would save the government money or not.

While a decision in *Meyer* to expand *Bivens* to include suit directly against the federal government would have worked an enormous and unprecedented change in our constitutional system, this case is completely different. For these purposes, CSC resembles a federal agent carrying out the directives of the federal government under contract, not a federal agency. In the courts below, CSC claimed that it was entitled to governmental immunity by virtue of its status as a government contractor. *See Malesko v. Corr. Servs. Corp.*, 229 F.3d 374, 381-82 (2d Cir. 2000). It lost that claim in the Second Circuit, and did not seek review of that issue here. Notwithstanding the rejection of that claim, what CSC seeks here is, in effect, to shield itself with the government's own immunity. The Court's decision in *Meyer* presents no rationale for granting such a shield to a private corporation.

B. The Other Exceptions to *Bivens* Are Irrelevant Here.

This Court has recognized two "judicial exception[s]" to the remedy for violation of constitutional rights recognized in *Bivens*. *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part). Neither of these exceptions has any relevance here.

First, the Court has declined to extend *Bivens* where Congress has created a comprehensive remedial scheme to address the issue. *See Bush v. Lucas*, 462 U.S. 367 (1983);

Schweiker v. Chilicky, 487 U.S. 412 (1988). In *McCarthy*, the Court specifically distinguished those cases, in which "Congress had legislated an elaborate and comprehensive remedial scheme," from the situation of a federal prisoner seeking money damages for denial of medical care, for whom "Congress has enacted nothing." 503 U.S. at 152. Congress has created no such system for the constitutional violations of private prison corporations.

Second, the Court has found that "the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' " making a *Bivens* remedy inappropriate, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), especially given "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." *Stanley*, 483 U.S. at 682. These "special factors" are not present in this case.

III. CASES ALLOWING SUIT UNDER SECTION 1983 AGAINST CORPORATIONS SUPPORT ALLOWING *BIVENS* SUITS AGAINST CORPORATIONS

There is no dispute that Section 1983 actions may lie against a corporation. Relying on *Monell v. Department of Social Services*, 436 U.S. 658, 688-89 (1978), CSC and the government argue, however, that *Bivens* actions should be treated differently from Section 1983 actions against corporations because the decision in *Monell* was based on the specific language of Section 1983. Absent this language, they contend, the *Bivens* cause of action does not include

corporations within its scope. The particular text of Section 1983 upon which this argument focuses is the language creating a cause of action against any person who "subjects" another to a constitutional violation or "cause[s another] to be subjected" to a deprivation of rights. The government argues that the only language in Section 1983 relevant to liability of a corporation is the language providing for liability against someone who "cause[s another] to be subjected to a deprivation of rights." *See* U.S. Br. at 28-30 (*citing Monell*, 436 U.S. at 690-92).

The problem with this argument is that the Court in *Monell* does not rely on the "causes to be subjected" language of Section 1983 to hold that a corporation is subject to suit. Rather, this Court allowed suit against a municipal corporation after noting that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687. Consistent with this principle, this Court and the lower federal courts have uniformly held that corporations that act under color of state law are persons for purposes of Section 1983. *See, e.g., Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 925 (1982); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 146 (1970).

Although the Court does analyze the "causes to be subjected" language of Section 1983, it does so to support its conclusion that a municipal corporation cannot be held liable absent a causal connection between a constitutional violation and a policy of the corporation. *See Monell*, 436 U.S. at 691. Moreover, the government does not suggest any reason why it should be significant for *Bivens*

purposes if an actor "subjects" another to a constitutional violation or merely "causes" another to be subjected to a violation. The critical point is the actor's causative role in the constitutional violation. Indeed, nothing in *Bivens* or its progeny indicates that a federal employee who directs another employee to violate a plaintiff's constitutional rights is exempt from a *Bivens* action. *Carlson* is instructive on this point. In *Carlson*, the mother of a federal prisoner who had died, allegedly because of a failure to provide necessary medical care, attempted to sue under *Bivens*. The defendants included the Director of the Bureau of Prisons and others who had "the power to transfer prisoners to facilities in any one of several States." *Carlson*, 446 U.S. at 25 n.11. Accordingly, the defendants before the Court included parties whose possible liability rested on proof that they had directed others to execute actions that deprived the prisoner of his Eighth Amendment right to medical care. The Court nevertheless recognized the existence of a *Bivens* action against the defendants.

More recently, the Court considered a case involving both a *Bivens* and a Section 1983 cause of action related to the actions of United States Marshals and sheriff's deputies in allowing members of the news media to accompany them in executing a warrant on a suspect. In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court held that it was a violation of the Fourth Amendment for law enforcement officers to cause third parties to accompany the officers in the enforcement of an arrest warrant when the third parties did not act in aid of the execution of the warrant. Again, the claim against the officers was that they *caused others* to take actions that violated the Constitution, yet

nothing in the opinion suggests that the *Bivens* claim should be evaluated differently from the Section 1983 claim on this basis. Indeed, neither the petitioner nor the government points to any case in which the distinction between violating a constitutional right personally and ordering an agent to violate a constitutional right had any significance for determining whether the existence of a *Bivens* cause of action should be recognized.

In *Butz v. Economou*, 438 U.S. 478, 500-01 (1978), this Court noted that the "constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible" and that it made no sense to "protec[t] the warden of a federal prison where the warden of a state prison would be vulnerable[.]" It similarly makes no sense to subject a for-profit corporation to Section 1983 liability for its constitutional violations when the company happens to confine state prisoners, but protect the corporation from *Bivens* liability if it confines federal prisoners. *See also Carlson*, 446 U.S. at 22 (stating that the "constitutional design" would be "stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression") (*quoting Butz*, 438 U.S. at 504). A warden of a federal prison is no less accountable for constitutional violations than the warden of a state prison; a corporation that confines federal prisoners should be no less accountable for constitutional violations than a corporation holding state prisoners.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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